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88-463

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
*Petitioner,*

v.

UNITED INTER-MOUNTAIN TELEPHONE COMPANY,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a federal court's power to vacate arbitration awards which do not "draw their essence" from the collective bargaining agreement empowers the court to overturn an arbitral decision on the ground that the court disagrees with the arbitrator's conclusion that the language of a collective bargaining agreement is open to interpretation?

2. If the answer to the first question is "yes," what are the limits of the courts' power to vacate arbitration awards on these grounds? *

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* In addition to the parties shown in the above caption, Communications Workers of America Local 3871 and Shirley M. Taylor were defendants-appellants in the courts below. Respondent United Inter-Mountain Telephone Company is a wholly-owned subsidiary of the United Telecommunications, Inc., a publicly owned corporation.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 6 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES

CASES — Page

Amer. Fed. of Television and Radio Artists v. Storer Broadcasting, 745 F.2d 392 (6th Cir. 1984) ..... 8
Amer. Fed. of Television and Radio Artists, Cleveland Local v. Storer Broadcasting Co., 660 F.2d 151 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981) ..... 8
American Oil Co., 40 Lab. Arb. 466 (1963) ..... 6
Anaconda Co. v. District Lodge 27, Int'l Ass'n of Machinists, 693 F.2d 35 (6th Cir. 1982) ..... 8
Bakers Union v. ITT Continental Baking Co., 749 F.2d 350 (6th Cir. 1984) ..... 8
Bakery Salesmen v. ITT Continental Baking Co., 692 F.2d 29 (6th Cir. 1982) ..... 8
Buckeye Cellulose Corp. v. District 654, UAW, 689 F.2d 629 (6th Cir. 1982) ..... 8
Cement Div., Nat'l Gypsum v. Steelworkers, 793 F.2d 758 (6th Cir. 1987) ..... 8
Champion Int'l Corp. v. Paperworks, 779 F.2d 328 (6th Cir. 1986) ..... 8
Detroit Coil Co. v. Machinists, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) .....7, 8, 9, 10
District 30, Mine Workers v. Sovereign Coal Corp., 750 F.2d 37 (6th Cir. 1984) ..... 8
Dobbs Inc. v. Local 614, Teamsters, 813 F.2d 85 (6th Cir. 1987) ..... 8
Firemen and Oilers v. Nestle Co., 630 F.2d 74 (6th Cir. 1980) ..... 8
Ford Motor Co. v. Plant Protection Ass'n, 770 F.2d 69 (6th Cir. 1985) ..... 8
General Drivers Local 89 v. Hays and Nicoulin, Inc., 594 F.2d 1093 (6th Cir. 1979) ..... 8
General Drivers, Warehousemen and Helper Local Union No. 89 v. Hays & Nicoulin, Inc., 594 F.2d 1093 (6th Cir. 1979) ..... 7
General Telephone of Ohio v. Communications Workers, 648 F.2d 452 (6th Cir. 1981) ..... 8
Grand Rapids Die Casting Corp. v. Local 159, UAW, 684 F.2d 413 (6th Cir. 1982) ..... 8

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Industrial Mutual Ass'n v. Amalgamated Workers, Local Union No. 383, 725 F.2d 406 (6th Cir. 1984) | 8 |
| Int'l Bro. Electrical Workers v. Cincinnati Electronics Corp., 808 F.2d 1201 (6th Cir. 1987) | 8 |
| Johnston Boiler Co. v. Local Lodge 893, Boilermakers, 753 F.2d 40 (6th Cir. 1985) | 8 |
| Knollwood Cemetery Ass'n v. Steelworkers, 789 F.2d 367 (6th Cir. 1986) | 8 |
| Morgan Services, Inc. v. Local 323, Amalgamated Clothing and Textile Workers, 724 F.2d 1217 (6th Cir. 1984) | 8 |
| Nat'l Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834 (6th Cir. 1985) | 8 |
| New Britain Machine Co., 8 Lab. Arb. 720 (1947) | 6 |
| Paperworkers v. Misco, —— U.S. ——, 56 L.W. 4011 (December 1, 1987) | 10 |
| Retail Clerks Local 1557 v. Murfreesboro Vending Service, Inc., 689 F.2d 623 (6th Cir. 1982) | 8 |
| Sears, Roebuck & Co. v. Teamsters Local 243, 683 F.2d 154 (6th Cir. 1982) | 8 |
| Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) | 10 |
| Steelworkers v. Timken Co., 717 F.2d 1008 (6th Cir. 1983) | 8 |
| Storer Broadcasting Co. v. Amer. Fed. of Television and Radio Artists, Cleveland Local, 600 F.2d 45 (6th Cir. 1979) | 8 |
| Washington Hospital Center v. Service Employees, 746 F.2d 1503 (D.C. Cir. 1984) | 7 |


STATUTORY PROVISIONS


| | |
|---|---|
| Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) | 2, 4 |
| Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d) | 2 |


MISCELLANEOUS


| | |
|---|---|
| Comment, Judicial Intervention in Arbitration Enforcement, 62 Denv. L. Rev. 593 (1985) | 7 |

TABLE OF AUTHORITIES—Continued

Page

Elkouri & Elkouri, How Arbitration Works (4th ed. 1985) ..... 6

Morris, *Twenty Years of Trilogy: A Celebration*, Proceedings of the Thirty-Third Annual Meeting of the Academy of Arbitrators 367 (1981) ..... 7

Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, Proceedings of the Fortieth Annual Meeting of the National Academy of Arbitrators 33 (1987) ..... 7

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No. ———

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
*Petitioner,*

v.

UNITED INTER-MOUNTAIN TELEPHONE COMPANY,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The Communications Workers of America, AFL-CIO, defendant appellant in the courts below, hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to enable the Court to review the judgment and decision in *United Inter-Mountain Telephone Company v. Communications Workers of America, AFL-CIO*, C.A. No. 87-5701 (April 25, 1988).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Appendix ("Pet. App.") to this petition at p. 1a. The opinion of the district court is reproduced at Pet. App. 2a-9a. The arbitration award is produced at Pet. App. 10a-25a. None of these opinions is officially reported.

## JURISDICTION

The decision of the court of appeals was rendered on April 25, 1988. Pet. App. 1a. On July 1, 1988, Justice Scalia signed an order extending the time for filing this petition to and including September 18, 1988. Pet. App. 26a. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suites for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

## STATEMENT OF THE CASE

The Communications Workers of America, AFL-CIO ("CWA" or "the Union") is the exclusive bargaining representative of a unit of employees working at various locations throughout the United Inter-Mountain Telephone Company ("the Company"). At all times relevant herein CWA and the Telephone Company were parties to a collective bargaining agreement which contained a typical grievance arbitration provision under which "grievances involving the interpretation or violation of

the express provisions of this Agreement shall be subject" to "final and binding" arbitration.

On June 2, 1984, the Telephone Company laid off Shirley Taylor, a fifteen-year employee of the Company, from her job as a clerk in its Kingsport, Tennessee office. Ms. Taylor was one of three clerks in that office, but she was the only clerk at that location who was in the bargaining unit represented by CWA and thus was the only clerk there covered by the collective bargaining agreement. After her lay off, Ms. Taylor's work was divided between the two remaining non-unit clerks, one of whom had worked for the Company for only three years and had been trained for her job by Ms. Taylor. Pet. App. 3a, 11a-14a. As a result of the layoff, Kingsport was the only one of the Company's office with no bargaining-unit clerical employees. Pet. App. 24a.

CWA filed a grievance on Ms. Taylor's behalf alleging that since "[t]he work she was doing is still there and now being performed by non-bargaining personnel," there was "no surplus" of bargaining unit employees and she should not have been laid off. Pet. App. 14a. Pursuant to § 4.02 of the agreement, the parties chose Professor Marlin M. Volz of the University of Louisville School of Law to decide this grievance. Arbitrator Volz sustained the grievance and ordered the Telephone Company to reinstate Ms. Taylor with back pay. Pet. App. 24a-25a.

The Arbitrator began his analysis with the management-rights provision in the agreement (§ 25.02), which permits the Company to "layoff for lack of work or other *proper reason*." Pet. App. 21a (emphasis added). In light of that provision, the Arbitrator concluded that "the burden was upon the Union to point to one or more contractual limitations upon managerial authority which made it contractually impermissible for the Company to have done what it did." *Id.*

The Arbitrator found such limitation in the provisions of the agreement governing work jurisdiction. In those provisions the Company "recognizes the right of its employees to perform its work" and agrees to "make every reasonable effort to plan its work to accomplish this end" (§ 18.01) and further agrees not to permit employees outside the unit to "perform the work of employees covered by this Agreement" (§ 18.03). Pet. App. 21a-22a. The Arbitrator read these provisions, along with the recognition clause of the agreement and the "implied covenant of good faith and fair dealing" inherent in all contracts, to "by implication state a preference, where a choice must be made, for the preservation of work for the bargaining unit and not for the erosion of work from such unit." Pet. App. 23a.

Although the Union had urged the Arbitrator to hold that these provisions established an absolute bar on "the removal of established work from the negotiated agreement," Pet. App. 15a, the Arbitrator refused to go that far. Instead the Arbitrator concluded:

> Preservation of work to such unit, and not erosion of work from it, clearly is implied whenever management is required, as here, to make a reasonable choice in assigning work between a bargaining unit and a non-bargaining unit employee, which work they both can do and generally have done. [Pet. App. 22a.]

And applying that standard the Arbitrator concluded that the Company did not "act reasonably" when it chose to layoff Ms. Taylor and assign her unit work outside of the unit—thereby leaving the Kingsport office without a unit clerical employee—in light of the fact that Ms. Taylor "had the ability to do the work" of the junior, non-unit employee who could have been laid off instead. Pet. App. 23a-24a.

The Company filed suit under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185

("LMRA"), seeking to vacate the award. Pet. App. 8a-9a. CWA counterclaimed for enforcement of the award. Ruling on cross-motions for summary judgment, the district court vacated the arbitration award. On appeal, the United States Court of Appeals for the Sixth Circuit, summarily affirmed "based on Judge Hull's well-reasoned opinion." Pet. App. 1a.

The district court began its analysis of the collective bargaining agreement by stating its own understanding of the management rights clause:

> It is manifestly clear that Article 25 of the collective bargaining agreement grants the Company the exclusive power to promote, demote, discharge, and lay off employees. This exclusive right is subject only to modifications and restrictions of the collective bargaining agreement. [Pet. App. 7a.]

Disregarding the Union's argument based on the recognition and work-jurisdiction provisions of the agreement, the district court found it "undisputed that no express terms of the contract limit the Company's exclusive authority"; that led the district court to conclude that the contract "granted the employer the exclusive and sole right to lay off." Pet. App. 7a-8a.

The district court went on to acknowledge that the "Company was bound by a covenant of good faith and fair dealing" and that the Arbitrator "did not exceed his authority in implying a reasonableness standard on the conduct of the Company." Pet. App. 7a. But the district court concluded that the only limitation the Arbitrator was entitled to imply was a prohibition on actions taken "in bad faith . . . capriciously or without reason." *Id.* The district court stated: "*short of demonstrated bad faith, capriciousness, or invidious intent, the arbitrator exceeded his authority in concluding that the Company's actions were unreasonable . . .*" Pet. App. 8a (emphasis added). Because no such demonstration was made, "the

arbitrator exceeded his authority in concluding that the Company's actions were unreasonable." *Id.*

## REASONS FOR GRANTING THE WRIT

The instant case raises a run-of-the-mine labor contract problem which the parties, and this Court's decisions, assign to the final and binding decision of an arbitrator. In his award Arbitrator Volz conscientiously harmonized a series of less than perfectly aligned contractual provisions in a manner that would make sense of the contract as a whole. The Arbitrator concluded, in essence, that the agreement impliedly stated a preference for preserving bargaining-unit work within the unit when that reasonably could be accomplished. The Arbitrator's conclusion in this regard accords with well-established arbitral law.[1]

The courts below, without paying any deference to the Arbitrator's Award, read the contract for themselves and read it differently from the Arbitrator. Those courts found it "manifestly clear" that the agreement "granted the employer the exclusive and sole right to lay off" and that the only limitation on this power that could be im-

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[1] In a leading decision, Arbitrator Saul Wallen explained that restrictions on management's authority to reassign bargaining unit work are implicit in the collective bargaining agreement:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. * * *
>
> The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes. [*New Britain Machine Co.*, 8 Lab. Arb. 720, 722 (1947).]

*See American Oil Co.*, 40 Lab. Arb. 466, 468 (1963) (Dykstra, Arb.) (stating that the views of Arbitrator Wallen quoted above are in accord with the views of a "significant majority" of arbitrators); Elkouri & Elkouri, *How Arbitration Works* 547-551 (4th ed. 1985).

plied is a prohibition on "demonstrated bad faith, capriciousness, or invidious intent." Disagreeing with the Arbitrator's contractual interpretation, the lower courts set aside his award.

The instant case is the latest in a long line of Sixth Circuit decisions—dating to that Court's much-criticized opinion in *Detroit Coil Co. v. Machinsts*, 594 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840, and its companion, *General Drivers, Warehousemen and Helper Local Union No. 89 v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979), on which the district court below relied—in which the Sixth Circuit has asserted the power to overturn arbitral awards which, in that court's view, are not consistent with a literal reading of the agreement.[2]

Indeed, since 1979, when *Detroit Coil* and *General Drivers* were decided, in cases arising under the LMRA the Sixth Circuit has rendered fifteen published opinions

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[2] Professor Charles Morris has termed *Detroit Coil* "a leading example of the Sixth Circuit's failure to heed the Supreme Court's admonition in *The Trilogy* that courts should not substitute their judgment for that of the arbitrator and the merits of an award." Morris, *Twenty Years of Trilogy: A Celebration*, PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 367 (1981).

More recently, Judge Reinhardt has observed that whenever *Detroit Coil* "is cited in an opinion, one can be almost certain that the award is being overturned." Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, PROCEEDINGS OF THE FORTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 33 (1987).

*See also Washington Hospital Center v. Service Employees*, 746 F.2d 1503, 1516 (D.C. Cir. 1984); Comment, *Judicial Intervention in Arbitration Enforcement*, 62 Denv. L. Rev. 593, 611 (1985).

*General Drivers* was decided one day before *Detroit Coil* by a panel consisting of two of the three judges who decided *Detroit Coil*. *General Drivers* is a six-paragraph per curiam opinion, and is therefore less well known than *Detroit Coil*.

vacating arbitration awards in whole or in substantial part,[3] as compared to only ten published opinions enforcing the award in whole or substantial part.[4] Thus, *in fully sixty percent of its recent published decisions involving review of arbitration awards, the Sixth Circuit has overturned the award.*

That *Detroit Coil* has led to such a degree of judicial activism is not at all surprising given the holding and

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[3] *Dobbs Inc. v. Local 614, Teamsters*, 813 F.2d 85 (1987); *Cement Div., Nat'l Gypsum Co. v. Steelworkers*, 793 F.2d 758 (1987); *Champion Int'l. Corp. v. Paperworkers*, 779 F.2d 328 (1986); *Ford Motor Co. v. Plant Protection Ass'n*, 770 F.2d 69 (1985); *Johnston Boiler Co. v. Local Lodge 893, Boilermakers*, 753 F.2d 40 (1985); *Bakers Union v. ITT Continental Baking Co.*, 749 F.2d 350 (1984); *Industrial Mutual Ass'n v. Amalgamated Workers, Local Union No. 383*, 725 F.2d 406 (1984); *Morgan Services, Inc. v. Local 323, Amalgamated Clothing and Textile Workers*, 724 F.2d 1217 (1984); *Buckeye Cellulose Corp. v. District 654, UAW*, 689 F.2d 629 (1982); *Grand Rapids Die Casting Corp. v. Local 159, UAW*, 684 F.2d 413 (1982); *Sears, Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154 (1982), *cert. denied*, 460 U.S. 1063 (1980); *Firemen and Oilers v. Nestle Co.*, 630 F.2d 474 (1980); *Storer Broadcasting Co. v. Amer. Fed. of Television and Radio Artists, Cleveland Local*, 600 F.2d 45 (1979); *General Drivers Local 89 v. Hays and Nicoulin, Inc.*, 594 F.2d 1093 (1979); *Detroit Coil Co. v. Int'l Ass'n of Machinists, supra.*

[4] *Int'l Bro. Electrical Workers v. Cincinnati Electronics Corp.*, 808 F.2d 1201 (1987); *Knollwood Cemetery Ass'n v. Steelworkers*, 789 F.2d 367 (1986); *District 30, Mine Workers v. Sovereign Coal Corp.*, 750 F.2d 37 (1984); *Amer. Fed. of Television and Radio Artists v. Storer Broadcasting Co.*, 745 F.2d 392 (1984); *Steelworkers v. Timken Co.*, 717 F.2d 1008 (1983); *Anaconda Co. v. District Lodge 27, Int'l Ass'n of Machinists*, 693 F.2d 35 (1982); *Bakery Salesmen v. ITT Continental Baking Co.*, 692 F.2d 29 (1982); *Retail Clerks Local 1557 v. Murfreesboro Vending Service, Inc.*, 689 F.2d 623 (1982); *Amer. Fed. of Television and Radio Artists, Cleveland Local v. Storer Broadcasting Co.*, 660 F.2d 151, *cert. denied*, 454 U.S. 1099 (1981); *General Telephone of Ohio v. Communications Workers*, 648 F.2d 452 (1981); *See also Nat'l Post Office Mailhandlers v. United States Postal Service*, 751 F.2d 834 (1985) (applying LMRA precedent).

reasoning of that decision. The court of appeals there set aside, as failing to draw its essence from the applicable collective bargaining agreement, an arbitrator's conclusion that a notification provision of a labor agreement was satisfied by mailing notice within the contractual deadline, even though the notice was not received until after the deadline. The court of appeals reasoned:

> The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions. [594 F.2d at 579]

And that court then took it upon itself to determine the meaning of the "plain and unambiguous provisions" of the contract:

> The term "notified" as used in the Agreement must be given its ordinary meaning in the absence of evidence indicating that the parties to this contract intended to expand or otherwise deviate from that meaning. The word "notified," in its ordinary usage, means the completed act of bringing information to the attention of another. . . . *We find* nothing in the record before the arbitrator to support his conclusion that the Company and Union intended to expand the scope of the word "notified" to encompass the mere dating of a letter . . . We conclude, therefore, that the arbitrator exceeded his authority in so holding. [*Id.* at 580; emphasis added; citations omitted]

*Detroit Coil* thus teaches, as the Sixth Circuit has recently observed, that

> An award fails to derive its essence from the agreement when (1) an award conflicts with express terms of the collective bargaining agreement; (2) an award imposes additional requirements that are not expressly provided in the agreement; (3) an

> award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement. [*Dobbs Inc. v. Teamsters Local 614*, *supra*, 813 F.2d at 86 (citations omitted).]

In short, so far as the Sixth Circuit is concerned, an award fails to draw its essence from the agreement whenever the award does not track the literal language of the agreement, as the court understands that language.

In its petition for a writ of certiorari in *Paperworkers v. S.D. Warren Co.*—a petition which is being filed contemporaneously with the instant petition—the United Paperworkers International Union ("UPIU") has demonstrated that the approach of *Detroit Coil*, which the First Circuit embraced in *S.D. Warren*, is (1) in conflict with the approach to judicial review of arbitral awards adopted by several other circuits; and (2) is inconsistent with the decisions of this Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960), and, more recently, in *Paperworkers v. Misco*, —— U.S. ——, 56 L.W. 4011 (December 1, 1987). UPIU also has demonstrated—and the Sixth Circuit experience confirms—that the *Detroit Coil* approach to judicial review fundamentally threatens the national labor policy which favors arbitration as the means of resolving labor disputes.

Counsel for the CWA in the instant case has collaborated with counsel for UPIU in *S.D. Warren* in preparing the petition for a writ of certiorari in the latter case. Rather than burdening this Court by repeating here the arguments made in *S.D. Warren*, we incorporate those arguments by reference.[5] For the reasons set forth above

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[5] A copy of the petition for certiorari in *S.D. Warren* is being served on counsel for respondent in this case along with this petition.

and in UPIU's petition in *S.D. Warren*, we urge the Court either to grant a writ of certiorari in this case and consolidate the case with *S.D. Warren*, or to grant the *S.D. Warren* petition and hold this case for disposition on the basis of the disposition in *S.D. Warren*.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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87-5701

UNITED INTER-MOUNTAIN TELEPHONE COMPANY,
*Plaintiff-Appellee,*

v.

COMMUNICATION WORKERS OF AMERICA,
COMMUNICATION WORKERS OF AMERICA,
LOCAL 3871, and SHIRLEY M. TAYLOR,
*Defendants-Appellants.*

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On Appeal From The United States District Court
for the Eastern District of Tennessee

[Filed April 25, 1988]

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BEFORE: KEITH and NORRIS, Circuit Judges; and WOODS*

PER CURIAM: Defendants-appellants Communication Workers of America, et al. appeal the district court grant of summary judgment, vacating the award of the arbitrator in this action brought pursuant to the Labor-Management Relations Act of 1947, 29 U.S.C. Section 185, and Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. Sections 9 and 10. Upon consideration of the briefs, record and oral argument in this case, we AFFIRM based on Judge Hull's well-reasoned opinion dated May 26, 1987.

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* Honorable George B. Woods, United States District Court for the Eastern District of Michigan, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

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No. CIV-2-86-239

UNITED INTER-MOUNTAIN TELEPHONE COMPANY

v.

COMMUNICATIONS WORKERS OF AMERICA, 3871, *et al.*

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[Filed May 26, 1987]

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## MEMORANDUM AND ORDER

This is an action for review of an arbitration award brought pursuant to § 301 of the Labor Management Relations Act (29 U.S.C. § 185) and 9 U.S.C. §§ 10 and 11. After the parties filed cross-motions for summary judgment, the Court conducted a hearing on May 1, 1987, during which the parties stipulated that no material facts were in dispute and that the Court could resolve the case upon the record.

The undisputed facts are as follows. In June, 1984, plaintiff, United Intermountain Telephone Company (the Company), determined that it must reduce its Outside Plant Engineering (OSPE) employees by six due to lack of work and general economic conditions.

Steve Brown, the OSPE Manager, analyzed five OSPE districts, including Johnson City, Kingsport, Bristol,

Greeneville, and Wytheville, Virginia and ultimately iden tified six surplus positions: one at Wytheville, two a Greeneville, two at Johnson City, and one at Kingsport Five were held by non-bargaining unit employees an one by the grievant, Shirley Taylor, a member of th defendant union, Communications Workers of America Local 3871, and a company employee since October 31 1969.

Since 1979, Ms. Taylor had worked in an Enginee ing Clerk-Drafting position as one of three clerical em ployees in the Kingsport facility. Ruth Bates, an eng neering clerical assistant; Yolanda Wolfe, a clerk-sten grapher; and Ms. Taylor shared clerical-drafting dutie although Ms. Bates performed the more complicate drafting; Ms. Wolfe devoted most of her time to clerica duties, including shorthand; and Ms. Taylor divided he time between clerical and drafting work, as she wa needed.

While Ms. Bates, Ms. Wolfe, and Ms. Taylor share overlapping duties, the Company chose to retain M Bates, who was the most skilled drafter, and Ms. Wolf who was the most skilled clerical worker. (Ms. Tayl could not do shorthand and was generally less skilled ar less experienced at clerical work. In fact, she had a plied for Ms. Wolfe's position and had not been hire due to her shorthand deficiencies.)

Therefore, on May 28, 1984, the Company gave M Taylor notice of lay off and offered her an opportuni to displace a junior worker in her same wage scale in nearby facility. Ms. Taylor refused this offer and filed grievance against the Company, which culminated in a arbitration hearing on January 31, 1986. At arbitrati the union and Ms. Taylor made no allegations that t company acted in bad faith or with union animus. Fu ther, they did not question management's right to surpl positions due to a lack of work. However, they charg

that under the collective bargaining agreement, the Company should have laid off Yolanda Wolfe instead of the grievant. The arbitrator sustained Ms. Taylor's grievance and awarded her the position held by Yolanda Wolfe, a non-bargaining unit employee, together with back pay from May 30, 1984 until December 15, 1985. The Company now asks the Court to vacate or modify the arbitrator's award.

Due to the great deference that must be given an arbitrator's award, the Court's scope of review is narrow. A reviewing court has no authority to weigh the merits of the grievance and to substitute its own judgment for that of the arbitrator's. *United Steelworkers of America v. Enterprise Wheel and Car Corp.* 363 U.S. 593, 598-99 (1960). Nevertheless, "the arbitrator is not unrestricted when fashioning an award" *Id.*, at 597; and where the arbitrator renders an award which is contrary to the express provisions of the contract, the Court may vacate the award. Furthermore, the arbitrator's award will not be enforced if his interpretation has no rational basis in the collective bargaining agreement:

> [An] arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from other sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

*Id.* Finally, the arbitrator may not base his award on policies and preferences outside the contract. *Local 1466, International Brotherhood of Electrical Workers, AFL-CIO v. Columbus & Southern Ohio Electric Co.* 455 F. Supp. 471 (S.D. Ohio, 1978).

In seeking review of the arbitrator's award in this action, plaintiff contends that the arbitrator abandoned the contract, substituted his own judgment for that of management, and rendered an award which does not draw its essence from the contract. Defendants, on the other hand, insist that the arbitrator's decision is based on sound contract interpretation and may not be overturned by this Court.

Accordingly, we now turn to the arbitrator's award. While holding for the grievant, the arbitrator initially found that the Company did possess general authority to lay off workers under Article 25 of the collective bargaining agreement. That article states, in pertinent part at §§ 25.02 and 25.03:

> Except as may be modified or restricted by the terms of this Agreement or by applicable labor laws, the Company shall have the exclusive right to . . . assign, modify or change work duties or requirements, (and) lay off for lack of work or other proper reason . . . .
>
> It is further understood and agreed that all rights heretofore exercised by, or inherent in the Company, not modified or restricted by the terms of this Agreement, are retained solely by the Company.

Accordingly, the arbitrator held that:

> Under its authority to "direct and supervise the Company's plant" and to "lay off for lack of work or other proper reason," as recognized by § 25.02, the Company made the initial decision to remove Ms. Taylor from the Engineering Clerk-Drafting Classification. It required no additional affirmative contractual authority to do so. Rather, . . . the burden was upon the Union to point to one or more contractual limitations upon managerial authority

> which made it contractually impermissible for the Company to have done what it did.

Arbitration Opinion and Award, p. 10.

After analyzing the collective bargaining agreement, the arbitrator found no explicit modification of the Company's managerial rights to lay off the grievant. However, he determined that Article 25, which recognized that management may "lay off for lack of work or other proper *reason*" and § 18.01, in which "the Company recognized the right of its employees to perform its work" and agrees to "make every *reasonable* effort to plan its work to accomplish this end" (emphasis supplied) form bases to imply a covenant of good faith and fair dealing.

Therefore, the ultimate issue, according to the arbitrator, was whether the Company acted reasonably in retaining a non-union employee, Ms. Wolfe, and laying off Ms. Taylor. The arbitrator then undertook to measure the comparative qualifications, experience, seniority, and value of Ms. Wolfe and Ms. Taylor, factored in Ms. Taylor's union status, and decided that Ms. Taylor was a more valuable employee than Ms. Wolfe. Therefore, he reasoned, the company had violated the implied covenant of good faith and fair dealing in choosing to retain Ms. Wolfe over Ms. Taylor.

After careful consideration of the arbitrator's award, the collective bargaining agreement, and the record as a whole, the Court finds that the arbitrator did abandon the contract and did exceed his authority in rendering this award.

> The classic abuse of arbitral power which court review will remedy is the case of the arbitrator who ignores the contract and bases the award on policies and preferences external to the contract. In such case, the arbitrator is not fulfilling his duty to interpret the contract but is dispensing 'his own brand of industrial justice.'

*Local 1466, supra., quoting, United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 365 U.S. 593, 597 (1960). In this case, the Court finds that the arbitrator did base his award on external preferences.

It is manifestly clear that Article 25 of the collective bargaining agreement grants the Company the exclusive power to promote, demote, discharge, and lay off employees. This exclusive right is subject only to modifications and restrictions of the collective bargaining agreement. "Except as may be modified or restricted by the terms of this agreement or by applicable labor laws, the Company shall have the *exclusive* right to . . . lay off for lack of work or other proper reason." § 25.02 (emphasis supplied). "[A]ll rights exercised by, or inherent in the Company, not modified or restricted by the terms of this agreement, are retained *solely* by the company."

It is undisputed that no express terms of the contract limit the Company's exclusive authority. Nevertheless, the arbitrator implied a reasonableness standard on the Company's conduct and then attempted to evaluate the Company's reasonableness by substituting his own judgment of the relative values of the grievant and Yolanda Wolfe. Since he reached a different conclusion than the Company as to the relative merits of the two employees, he decided that the Company had acted unreasonably and had breached its duty of good faith.

Of course, the Company was bound by a covenant of good faith and fair dealing; and certainly the arbitrator did not exceed his authority in implying a reasonableness standard on the conduct of the Company. However, in applying the standard, the arbitrator did not evaluate whether the Company had legitimate reasons for choosing to retain Ms. Wolfe and to lay off Ms. Taylor. He did not find that the Company acted in bad faith or that the Company acted capriciously or without reason. Instead, he substituted his own judgment for that of the

Company's, evaluated the relative merit of the employees, and found that the Company's decision was incorrect. Having determined that Ms. Taylor was, in his mind, the more experienced and the more valuable worker, he concluded that the Company had acted unreasonably and issued an award in favor of Ms. Taylor. In doing so, he abandoned the contract, which granted the employer the exclusive and sole right to lay off; substituted his own judgment for that of the employer's; and "dispensed his own brand of industrial justice."

In *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979), the Court found that where, under the collective bargaining agreement, the employer retained the exclusive right to judge the merit and ability of his employees, the arbitrator may not second guess the employer.

> By substituting his own judgment of the discharged employee's fitness for that of the Company, the arbitrator exceeded his authority under the collective bargaining agreement. His construction of the contract, therefore, did not draw 'its essence from the collective bargaining agreement.'

*Id.*, at 1094, *quoting*, *Enterprise Wheel & Car Corp.*, *supra.*

While the collective bargaining agreement in this case did not explicitly state that only the employer could judge the ability of its employee, it did grant exclusive and sole power to the employer to lay off. Therefore, short of demonstrated bad faith, capriciousness, or invidious intent, the arbitrator exceeded his authority in concluding that the Company's actions were unreasonable because they laid off an employee, which in his own judgment, was more worthy. Accordingly, the plaintiff's motion for summary judgment is GRANTED; defendants' motion

for summary judgment is DENIED; and it is ORDERED that the award of the arbitrator be VACATED.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
United States District Judge

# ARBITRATION OPINION AND AWARD

---

In the Matter of Arbitration Between:

COMMUNICATIONS WORKERS OF AMERICA

and

UNITED INTER-MOUNTAIN TELEPHONE COMPANY

---

SHIRLEY TAYLOR GRIEVANCE

---

Appearances:

*For the Union*:

William A. McHugh, Jr.
Attorney

*For the Company*:

Steven E. Kramer,
Attorney

Arbitrator:

Marlin M. Volz, University
of Louisville School of Law
Louisville, Kentucky

By the terms of the contract between the Communications Workers of America, hereinafter referred to as the Union, and United Inter-Mountain Telephone Company, hereinafter called the Company, disputes between the parties are to be settled in accordance with the grievance and arbitration procedures therein specified. Pursuant to such procedures Marlin M. Volz was selected as the arbitrator to hear a dispute concerning a layoff. A hearing

was held on January 31, 1986, at the Holiday Inn, I-81, Bristol, Tennessee, at which the parties were afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine and cross-examine witnesses. Post-hearing briefs were submitted.

*Issue*

Did the Company violate the agreement when it removed the grievant Shirley Taylor from her position as Engineering Clerk-Drafting from the Kingsport, Tennessee office on or about June 2, 1984, resulting in her layoff, and if so, what should be the remedy?

*Statement of Facts*

On May 28, 1984, Shirley M. Taylor, hereinafter called Ms. Taylor, received a layoff notice reading in part:

> This is to inform you that there is a surplus in your work group. You are hereby informed that you will be placed on lay-off status at the end of your last scheduled tour for the week ending Saturday, June 2, 1984.

That notice also informed her of her contractual rights, if qualified to do the work, to displace junior employees in her same wage scale or a lower job classification. She elected not to do so and instead accepted layoff. The layoff in question concerned employees in five district offices of the Company and involved the surplusing of five non-bargaining unit employees—one at Wytheville, two at Greeneville, two at Johnson City, and one bargaining unit employee, namely, the grievant, Ms. Taylor, at Kingsport. With her layoff no bargaining unit employee was left at Kingsport, although one remained at Bristol, two at Wytheville, one at Johnson City, and one at Greeneville.

One of the management officials involved in the selection of employees for layoff was Stephen Brown, Outside

Plant Engineering Manager, who testified that in selecting among those to be surplused he found that Kingsport and Wytheville were the only districts with two clerical employees and that he selected one of them from Kingsport to be surplused because Wytheville had field offices. Ms. Taylor does not question the propriety of surplusing one of the clerical employees at Kingsport but she contends that she should have been retained because of her much greater seniority and that Yolanda Wolfe should have been the one surplused. Ms. Taylor had been hired on October 31, 1969, had worked eight years at Kingsport, and since 1979 as an Engineering Clerk—Drafting, a bargaining unit position. Ms. Wolfe was not hired until June, 1981, when she was awarded a non-bargaining unit position of Clerk-Stenographer, replacing Rose Claman, who had held the position for over ten years. When the latter's position became vacant, both Ms. Wolfe and Ms. Taylor competed for the position with it being awarded to Ms. Wolfe when Ms. Taylor failed the shorthand test. Despite such failure, Stanley Romanoff, Jr., Employee Relations Manager, on cross-examination, agreed that Ms. Taylor was capable of performing the work in question.

Their job descriptions read:

> ENGINEERING CLERK—DRAFTING—General clerical duties, drafting, posting drawings or records, operating office machinery and certain specific duties. Academic studies sufficient to efficiently perform job duties. Two semesters of drafting or demonstrate equivalent drafting and lettering ability. Ability to type 30 words per minute. Legible handwriting. Ability to learn and understand semi-technical nomenclature.
>
> CLERK-STENOGRAPHER—*Duties and Responsibilities*
>
> 1. The Clerk-Stenographer takes dictation using shorthand or transcribes from dictating equip-

ment reports, letters, or other communications, sometimes involving technical or specialized terms.

2. The incumbent answers the telephone and makes appointments as assigned.

3. The incumbent compiles and types statistical reports and correspondence, maintains records, general files and follow-up files as required for efficient operations.

4. The Clerk-Stenographer handles mail, types letters/correspondence and performs other phases of secretarial work as required.

5. The incumbent files and posts necessary information within the Department as assigned.

6. The incumbent assists or performs special duties as directed.

Prior to Ms. Taylor's layoff there were three employees at the Kingsport District Office performing clerical functions, the third one being Ruth Bates, with a title of Engineering Clerical Assistant. She had much greater seniority than either of the other two and on one is questioning the propriety of having retained her. She had worked for 29 years at Kingsport and had become an expert in performing the drafting function, being assigned to difficult and complex drafting work. A survey taken of the work performed by her between January 1, 1984, and June 1, 1984, shows that in this period she devoted 60.9% of her time to drafting, with no hours for general clerical duties. A review of her job description indicates that drafting is not one of the duties listed therein. The bulk of Ms. Wolfe's duties since the beginning of her employment in June of 1981 has involved the usual clerical functions of typing, filing, answering the telephone, taking dictation and transcribing her notes, copying blueprints, preparing work orders, etc. For some

of the time she served as the secretary to Mr. Brown and performed the clerical work connected with the handling of labor relations matters, some of which were confidential in nature. At the time of the layoff in question, she no longer was performing this work. The survey of her work for the period January 1, 1984 through June 1, 1984 shows that 85.8% of her time was spent performing general clerical duties. She acknowledges that Ms. Taylor trained her in the performance of a number of her duties, including the new duties which she later assumed with the departure of Ms. Taylor.

With the employment of Ms. Wolfe, the content of Ms. Taylor's work shifted to a significant extent from clerical to drafting. She agrees with the results of the survey of her work for the period January 1, 1984 through June 1, 1984 showing that 31.7% general clerical duties, and the remainder involved miscellaneous tasks. She testified that while Ms. Wolfe had done the clerical work for Mr. Brown, she had done it for Mr. Dunn; that she had also prepared a number of weekly, monthly, quarterly, and production reports; and that she did the simple drafting while Ms. Bates did the complex. It was pointed out that her job description is the only one which specifically mentions drafting as one of her duties. Her grievance reads:

> On May 25, 1984 the company surplused the grievant's job. The work she was doing is still there and now being performed by non bargaining personel. Since no other union personel are available in this work group to perform these duties there can be no surplus. (Article 18.03 current labor agreement.)

*Contentions of the Union and Contract Provisions*

The contentions of the Union focus on six main points. First, it argues that neither the Management Rights clauses (Article 25) nor the Work Jurisdiction sections (Article 18) support the Company's position. The former provides in part:

> 25.02 Except as may be modified or restricted by the terms of this Agreement or by applicable labor laws, the Company shall have the exclusive right to: direct and supervise the Company's plant and business operations and policies; . . . assign, modify or change work duties or requirements, layoff for lack of work or other proper reason. . . .
>
> 25.03 It is further understood and agreed that all rights heretofore exercised by, or inherent in the Company, not modified or restricted by the terms of this Agreement, are retained solely by the Company.

The Union reasons that the above contractual provisions do not free the Company to reassign to a non-unit employee the drafting and clerical duties formerly performed by Ms. Taylor and thereby cause the removal of established work from the negotiated agreement.

The second contractual provision, which the Union contends does not support the Company's position, is Article 18—Work Jurisdiction, the first section of which reads:

> 18.01 The Company recognizes the right of its employees to perform its work, and will make every reasonable effort to plan its work to accomplish this end.

The Union maintains that the Company did not live up to the objective of "every reasonable effort" envisaged by this section, in that it had Ms. Taylor train Ms. Wolfe as to a number of her duties and then retained her in preference to Ms. Taylor, although the latter had much greater seniority.

Section 18.03 provides in part:

> Company employees who are excluded from the bargaining unit will not perform the work of employees covered by this Agreement, except in the case of service emergencies, and for the purpose of giving or receiving training. . . .

Instead of authorizing the Company to assign bargaining unit work to non-unit employees, section 18.03, according to the Union, actually prohibits it except in the two exceptions specified, neither of which is present in this case. The Union states that, even assuming there was a sharing by, or overlap of duties between, Ms. Taylor and Ms. Wolfe, the prohibition still applies, especially since the job descriptions make clear that no overlap between their two classifications existed as to drafting duties.

Section 18.04 reads:

> The parties recognize that there are overlapping functions between engineering, professional and personnel in the engineering bargaining unit.

Both Ms. Taylor and Ms. Wolfe were personnel in such bargaining unit. However, according to the Union, the overlapping functions referred to in section 18.04 relate not to clerical work but, rather, to work assignments involving Engineers, Engineer Associates (non-unit), and Apprentice Engineer Associates (bargaining unit). Section 18.04 was involved in a case submitted to Arbitartor Fred Holly in 1975. The issue before Arbitrator Holly concerned the contractual propriety of "allowing Apprentice Associate Engineers to perform the duties of an Associate Engineer or by replacing Apprentice Associate Engineers with Associate Engineers." In its post-hearing brief submitted to Arbitrator Holly the Company stressed the overlap in job duties between those two job classifications, stating that "Admittedly, Apprentice Associate Engineers and Associate Engineers perform identical work," and adding that "their job functions overlap in total." Union witnesses contended at the hearing on the present grievance before this arbitrator that it was to this overlap that Section 18.04 was directed and not to any overlap that might exist between job duties performed by personnel in the different clerical classifications. Mr. Johnny Thompson, Local Union President, testified that

Section 18.04 relates only to professional employees and that it does not apply to clerical or to clerical drafting work. At such hearing on the present grievance Mr. Stanley Romanoff, Jr., Employee Relations Manager, stated that the Company is not claiming that the work in question was professional employee work, that it was emergency work or for training, or that Section 18.04 authorized the selection in question, namely, of Ms. Wolfe in preference to Ms. Taylor.

As a second point, the Union contends that the recognition clause—Article 1—clearly establishes that the jobs listed in Appendix A are covered by the Agreement—including Engineering Clerk—Drafting, the classification held by Ms. Taylor and that such jobs may not be unilaterally removed or diminished during the term of the agreement.

In a third contention, the Union emphasizes that, according to its job description, the primary duties of an Engineering Clerk—Drafting are drafting, for which its holder is paid $.20 per hour more than a clerical employee not doing drafting. A note to Appendix A provides:

> Engineering Clerk—Drafting will receive $.20 per hour straight-time pay.

The Union summarizes in its post-hearing brief at page 10:

> Testimony at the hearing revealed that the drafting duties assigned to grievant have been, and still are being performed today, only by a non-union person

As a fourth point, the Union stresses job descriptions pointing out that only the one for Engineering Clerk—Drafting lists drafting as one of its duties; that neither of those for the other two clerical positions—Clerk Stenographer and Engineering Clerical Assistant—do so; that such job descriptions make clear that so far as drafting duties are concerned, no overlapping is involved; and

that the Company may not seize upon its own failure to follow the job descriptions "to boot-strap its contractual claim to remove this job function from employees represented under the contract." Union brief p. 11.

The Union's fifth point is that it has not agreed to, or acquiesced in, the Company's assignment of drafting and/or clerical functions to non-unit employees. It points to the filing of six grievances involving work jurisdictional disputes between unit and non-unit employees, three previous ones having gone to arbitration. In a 1984 award Arbitrator William P. Murphy found that "The Company violated the collective bargaining agreement by assigning to non-unit personnel the call-through testing involved in the Blountville cutover." In Grievance No. T-8112, a settlement was reached as to the clerical work in question in which the Company agreed "to abide by Article 18, Section 18.03, to accomplish the work of its bargaining unit personnel."

Finally, the Union argues that no "special circumstances" existed making Section 18.05 applicable. It provides:

> The parties recognize, however, that there are special circumstances and/or rare occasions when excluded personnel may be appropriately used on work otherwise performed by employees covered by this Agreement.

The contentions of the company may also be reduced to six points, its first point being that the initial analysis must examine the facts as Mr. Brown did in 1984 when he was required to reduce the workforce by six employees and in doing so selected five non-unit employees for reduction and only one unit employee and selected the latter from the district office having more clerical employees than any other for the same amount of work.

The Company's second argument is that Ms. Taylor was the logical one of the three clerical employees at

Kingsport to be surplused because the complex, and the bulk of other, drafting work was done by Ms. Bates and the vast majority of the clerical work was performed by Ms. Wolfe; the grievant had no exclusive work and served as a swing person; Ms. Wolfe continues to do the same work she did before; and personnel were kept who had normally performed the work which remained.

A third contention by the company is that there is no contractual obligation to compare seniority between bargaining unit and non-bargaining unit personnel and that in viewing Mr. Taylor's greater seniority it must be kept in mind that she failed to qualify for the position awarded to Ms. Wolfe because of lack of shorthand.

It maintains, fourthly, in its post-hearing brief at page 19:

> Perhaps the most persuasive piece of evidence in this entire hearing is the fact that when Grievant bid into her position in 1979 she assumed this identical disputed work from, and was trained by, a non-bargaining unit employee, Bernice Kessling. Ms. Taylor admitted, and the evidence was uncontradicted, that the work Grievant now claims to be exclusively bargaining unit work was previously performed by Ms. Keesling.

The Company's fifth contention is that the Union failed to identify any contractual restraint upon the authority of the Company to do what it did and that the Company needed no affirmative language in the Agreement to support its action.

Finally, the company stresses that in practice going back as far as 1969 clerical work has been shared by bargaining and non-bargaining unit employees and that such work was not only commingled among them at the Kingsport district office but also at virtually all of the other district offices. It summarizes in its post-hearing brief at page 23:

As stated in the hearing, Employer, although not waiving the application of § 18.04, need not ever get to the "overlapping" *grant of authority* found in § 18.04, in view of the fact that the disputed work in the current case has always been performed by both bargaining and non-bargaining unit clerical employees. Therefore, the "overlap" already exists and additional contractual support is cumulative.

*Discussion*

It is concluded that Ms. Taylor was laid off out of the Engineering Clerk-Drafting classification and not that such classification was eliminated even though she was the only one serving in that classification at the time in the Kingsport office. Under our facts and contractual provisions merely leaving a job classification unfilled standing alone does not constitute a violation of the Labor Agreement. Nor under our facts does Section 7.04, which incidentally was not cited by the parties, play any significant role in the resolution of this dispute since, here, no choice between employees in the affected job classification needed to be made as Ms. Taylor was the only person in it at Kingsport. Section 7.04 reads in part:

> In the event of a reduction in force, the employee with the least seniority in an affected job classification shall be the first employee laid off provided there are senior employees available who are qualified and fit to perform available work.

That sentence has no application to our facts where the competition for retention was between a bargaining unit employee and a non-bargaining unit employee. It is a familiar principle that seniority rights as such exist only to the extent provided by contract. An examination of the seniority article (Article 7) confirms the Company's conclusion that the seniority provisions of the contract do not directly apply as between bargaining unit and non-bargaining unit employees.

Under its authority to "direct and supervise the Company's plant" and to "layoff for lack of work or other proper reason", as recognized by Section 25.02, the Company made the initial decision to remove Ms. Taylor from the Engineering Clerk-Drafting classification. It required no additional affirmative contractual authority to do so. Rather, in a case of this nature the burden was upon the Union to point to one or more contractual limitations upon managerial authority which made it contractually impermissible for the Company to have done what it did.

The Union writes in its post-hearing brief that:

> The starting point for resolution of any jurisdictional or assignment of work issue is the recognition clause.

Such clause (Section 1.01) provides in part:

> The Company recognizes the Union as the sole and exclusive bargaining agent with respect to rates of pay, hours of work, and other conditions of employment for all employees presently listed under Wage Scales 1 through 10, in Appendix "A" herein. . . .

That provision is not directly helpful to the Union under our facts. It identifies the Union as the sole bargaining representative of the covered employees and identifies those who are covered by the Agreement, but it does not define work jurisdictional boundaries. It must be observed, however, that the recognition clause provides a basis for the application of the implied covenant of good faith and fair dealing, which, as is explained later, plays a deciding role in this decision.

Supplementing and forming an additional basis for the application of the implied covenant of good faith and fair dealing is Section 18.01, which the Union also references. There the "Company recognizes the right of its employees to perform its work," and agrees that it "will make every reasonable effort to plan its work to accom-

plish this end." The work that Ms. Taylor had done for the five years of her employment for the Company as an Engineering Clerk-Drafting was part of "its work" which the Company promises at least by implication to make "every reasonable effort" to preserve to the bargaining unit. Preservation of work to such unit, and not erosion of work from it, clearly is implied whenever management is required, as here, to make a reasonable choice in assigning work between a bargaining unit and a non-bargaining unit employee, which work they both can do and generally have done.

This same choice is inherent in the application of Section 18.03, which directs that "Company employees who are excluded from the bargaining unit will not perform the work of employees covered by this Agreement. . . ." Again preservation of work to, and not erosion of work from, the bargaining unit appears to be a primary consideration. We assume, as the Company urges, that clerical and drafing work of the kind done by Ms. Taylor also has been done over the years by Ms. Wolfe and by Ms. Bates, so that the doctrine of overlap applies. Elkouri and Elkouri explain at page 505 of their treatise, *How Arbitration Works, Fourth Edition*:

> When work falls within the job descriptions of two or more crafts or classifications, or is by nature a borderline or overlapping duty of two or more crafts or classifications, or if it has been performed by two or more crafts or classifications in the past, management has been permitted considerable leeway in assigning the work and ordinarily has not been limited to assigning it exclusively to one of the crafts or classifications.

But that doctrine and Section 18.03 deal with the assignment of work which presupposes at least two employees, one in the bargaining unit and one without. Neither controls the selection of the employee to be re-

tained when one of the two must be laid off and the one retained must take over the work formerly done by the one laid off, which is the case before us. Section 18.04 also does not cover a layoff situation. Since, as explained earlier, Section 7.04 relating to reductions in force has no application, the contractual provision which must be applied, since other provisions do not apply, is the Management Rights clause found in Article 25. Except as "restricted by the terms of this Agreement," Article 25 recognizes that management may "layoff for lack of work or other proper reason." The words "proper reason" are consistent with a term of the labor agreement which the law implies, namely, that management will exercise its retained powers reasonably and not arbitrarily, capriciously, or discriminatorily. This implied restraint upon managerial authority was described by Prof. Williston, leading authority on contract law, as the implied covenant of good faith and fair dealing. He wrote on page 159 of volume V of his treatise on Contracts:

> The underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.

The ultimate issue boils down to this: did the Company act reasonably when it chose Ms. Wolfe for retention instead of the grievant, Shirley Taylor. For the reasons hereinafter stated, it is found that it did not.

First, as previously reasoned, the recognition clause and Sections 18.01 and 18.03 of the Agreement by implication state a preference, where a choice must be made, for the preservation of work for the bargaining unit and not for the erosion of work from such unit.

Second, the issue is not how each of the competing employees originally obtained their positions but which of the two should be retained in a layoff. While Ms. Wolfe most likely was the better qualified in shorthand, Ms. Taylor clearly had the edge in drafting experience. For the period 01-01-84 through 06-01-84 Ms. Taylor had spent 31.7% of her working time doing drafting work while Ms. Wolfe had spent only 5.9%.

Third, after the reduction in force the same variety of work generally existed as before. It can be expected that each of the reduced number of remaining employees may be called upon from time to time to perform a wider range of duties than formerly. With her many more years of experience for the Company and her combined experience in both the clerical and drafting aspects of the work, Ms. Taylor was the more versatile of the two and knew how to perform a wider range of tasks. She had trained Ms. Wolfe on how to do a number of them.

Fourth, it was reasonable to have recognized Ms. Taylor's many more years of service to the Company. It was admitted that she had the ability to do the work.

Fifth, among the district offices, Kingsport is the only one which does not have a clerk who is a member of the bargaining unit. The other offices recognized that work falling within the doctrine of overlap is to be shared between the two units, bargaining and non-bargaining, and is not to be given entirely to one.

*Award*

The grievance is sustained. Ms. Taylor is to be reinstated to her former position without loss of seniority and with back pay from the date of layoff to December 15, 1985, by which date a decision by the arbitrator probably would have been issued if her illness had not caused a postponement of the arbitration hearing sched-

uled for October 25, 1985. Any back pay is to be reduced by earnings from jobs or additional work on prior jobs obtained after her layoff.

/s/ Marlin M. Volz
MARLIN M. VOLZ
Arbitrator

Dated: April 30, 1986

SUPREME COURT OF THE UNITED STATES

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No. A-8

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
*Applicants*

v.

UNITED INTER-MOUNTAIN TELEPHONE COMPANY

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 18, 1988.

/s/ Antonin Scalia
Associate Justice of the
Supreme Court of the
United States

Dated this 1st day of July, 1988.

(2)

No. 88-463

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH E. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1988

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

*Petitioner,*

v.

UNITED INTER-MOUNTAIN
TELEPHONE COMPANY,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW[1]

Whether a federal court can vacate an arbitration award which fails to draw its essence from the negotiated terms of the collective bargaining agreement?

---

[1]In satisfaction of the requirements of United States Supreme Court Rule 28.1, United Inter-Mountain Telephone Company's parent corporation and holding company is United Telecommunications, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Statement of the Case | 2 |
| Reasons To Deny The Petition For Writ Of Certiorari | 7 |
| I. Limitations On A Court's Authority To Review Arbitration Awards Are Well Settled Law | 7 |
| II. This Case Raises No Important Question Of Federal Law Warranting Review | 8 |
| III. There Is No Conflict Among The Circuits | 12 |
| Conclusion | 19 |
| Appendix | App. 1 |

# TABLE OF AUTHORITIES

Page

CASES

*Am. Fed. of Television & Radio Artists, Cleveland Local (AFTRA) v. Storer Broadcasting Co.*, 745 F.2d 392 (6th Cir. 1984) ..... 17

*Anaconda Co. v. Dist. Lodge No. 27, Int'l Assoc. of Machinists*, 693 F.2d 35 (6th Cir. 1982) ..... 14

*Arco-Polymers, Inc. v. Local 8-74, OCAW*, 671 F.2d 752 (3d Cir. 1982) ..... 14

*Detroit Coil Co. v. Int'l Assoc. of Machinists & Aerospace Workers Lodge #82*, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) ..... 15, 16

*Dreis & Krumpt Mfg. v. Int'l Ass'n of Machinists*, 802 F.2d 247 (7th Cir. 1986) ..... 16

*Ethyl Corp. v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985) ..... 17

*Ford Motor Co. v. Plant Protection Ass'n.*, 770 F.2d 69 (6th Cir. 1985) ..... 14, 16

*General Telephone Co. v. Communications Workers of America*, 648 F.2d 452 (6th Cir. 1981) ..... 16

*HMC Mgt. Corp. v. Carpenters Dist. Council*, 750 F.2d 1302 (5th Cir. 1985) ..... 15

*Industrial Mutual Ass'n v. Amalgamated Workers, Local Union No. 383*, 725 F.2d 406 (6th Cir. 1984) ..... 14

*Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980) ..... 12, 13

*Jones Dairy Farm v. Local No. P-1236, United Food & Commercial Workers*, 760 F.2d 173 (7th Cir. 1985) ..... 16

*Kane Gas Light & Heating v. Int'l Bhd. of Firemen & Oilers, Local 112*, 687 F.2d 673 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983) ..... 12, 13

TABLE OF AUTHORITIES—Continued

Page

*Kewanee Machinery v. Local Union No. 21, Int'l Bhd. of Teamsters*, 593 F.2d 314 (8th Cir. 1979) ..... 14

*Local Union 59, I.B.E.W. v. Green Corp.*, 725 F.2d 264 (5th Cir. 1984) ..... 16

*Morgan Services, Inc. v. Local 323, Chicago Central States Jt. Bd.*, 724 F.2d 1217 (6th Cir. 1982) ..... 17

*St. Louis Theatrical Co. v. St. Louis Theatrical Bhd.*, 715 F.2d 405 (8th Cir. 1983) ..... 15

*Storer Broadcasting Co. v. AFTRA, Cleveland Local*, 600 F.2d 45 (6th Cir. 1979) ..... 17

*Teamsters Local Union 657 v. Stanley Structures*, 735 F.2d 903 (6th Cir. 1984) ..... 17

*Timken Co. v. Steelworkers*, 492 F.2d 1178 (6th Cir. 1974) ..... 13, 14

*United Elec., Radio & Mach. Workers v. Litton*, 704 F.2d 393 (8th Cir. 1983) ..... 16

*United Paperworkers v. Misco, Inc.*, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) ..... 8, 10, 11, 17, 18

*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) ..... 7

*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) ..... 7, 8, 11, 12

*United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960) ..... 7

*W. R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757 (1983) ..... 8, 18

*Young Radiator Co. v. Int'l Union UAW*, 734 F.2d 321 (7th Cir. 1984) ..... 15

TABLE OF AUTHORITIES—Continued

Page

STATUTORY PROVISIONS

Sixth Cir. Ct. Rule 24(a) ..... 9

MISCELLANEOUS

Elkouri & Elkouri, *How Arbitration Works* (4th ed. 1985) ..... 18

No. 88-463

In The

# Supreme Court of the United States

October Term, 1988

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

*Petitioner,*

v.

UNITED INTER-MOUNTAIN
TELEPHONE COMPANY,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF IN OPPOSITION

Respondent United Inter-Mountain Telephone Company (hereinafter referred to as the "Company" or "Employer"), hereby responds to and opposes the issuance of a writ of certiorari to review the per curiam decision of the United States Court of Appeals for the Sixth Circuit. Respondent also incorporates, by reference, the Brief in

Opposition filed by S.D. Warren Company in Case Number 88-462 on November 18th, 1988.

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## STATEMENT OF THE CASE

In the summer of 1984, as part of a company-wide reduction in force, Employer reduced its Outside Plant Engineering (OSPE) workforce by six employees. OSPE staff work out of five district offices located within a 100 mile radius of Kingsport, Tennessee. The OSPE Manager analyzed the staffing needs for each district and selected the requisite six positions to be reduced. Five of the six were non-bargaining unit employees; only one (the grievant, Shirley Taylor) was a member of the bargaining unit represented by the Petitioner (hereinafter "CWA" or "Union").

Ms. Taylor (the grievant) was one of three clerical employees working in OSPE's district office located in Kingsport, Tennessee. Ms. Taylor's duties involved both simple drafting and general clerical work. Historically, both bargaining unit and non-bargaining unit personnel have performed the clerical and drafting work. Grievant's job duties were previously performed by a non-bargaining unit employee. The second employee, Ms. Ruth Bates, a non-unit employee, was assigned difficult and complex drafting work. The third, Ms. Yolanda Wolfe, was employed as a clerk-stenographer (also a non-unit employee). She spent her time performing the majority of the office's extensive clerical and stenographic work.

Analyzing the three, the Company decided to eliminate the "swing" position (Ms. Taylor) and to retain the employee most skilled in drafting (Ms. Bates) and the employee most skilled in clerical and stenographic duties (Ms. Wolfe). Therefore, in May, 1984, the Company advised Ms. Taylor that she would be laid off effective June 2, 1984, unless she chose to displace (or bump) a junior employee in the same (or lower) job classification. Ms. Taylor refused the offer to continue in the same job classification at the same pay in another office less than twenty (20) miles away and, instead, voluntarily elected layoff. The Union then filed a grievance on Ms. Taylor's behalf.

**Arbitration**

The grievance was processed through all four steps of the grievance procedure. Unable to resolve the grievance, the Union requested that it be submitted to arbitration. The parties presented the following issue to Arbitrator Marlin M. Volz:

> Did the Company *violate the agreement* when it removed the grievant Shirley Taylor from her position as Engineering Clerk-Drafting from the Kingsport, Tennessee office on or about June 2, 1984, resulting in her layoff, and if so, what should be the remedy? (App. 11a, emphasis added).

The arbitrator concluded that Ms. Taylor was laid off, that her job classification was not eliminated, and that the Employer's decision to leave a job classification unfilled was not, in itself, a violation of the agreement. (App. 20a). The arbitrator then found that Employer was authorized

to remove Ms. Taylor from her position under the management rights clause:

> 25.02 Except as may be modified or restricted *by the terms of this Agreement* or by applicable labor laws, the Company shall have the exclusive right to: direct and supervise the Company's plant and buisness operations and policies; . . . assign, modify or change work duties or requirements, [and] layoff for lack of work or other proper reason. (Article 25, § 25.02 quoted at App. 15a, emphasis added).

In summary, the arbitrator found that Employer ". . . required no additional affirmative contractual authority" for its action and concluded that "the burden was upon the Union to point to one or more contractual limitations upon managerial authority which *made it contractually impermissible* for the Company to have done what it did". (App. 21a, emphasis added). The arbitrator then reviewed all of the provisions cited by the Union for its argument that it was contractually impermissible for the Company to lay off Ms. Taylor.

First, he found the recognition clause (§ 1.01) ". . . not directly helpful to the Union" because it did ". . . not define work jurisdictional boundaries". (App. 21a). Second, he found that neither the doctrine of overlap (a position argued by the Employer based upon the fact that both unit and non-unit employees had historically performed the same work) nor Section 18.03 (a work jurisdiction clause argued by the Union). ". . . control[ ] the selection of the employee to be retained when one of the two must be laid off." (App. 23a). Third, he concluded that Section 18.04 did not apply to a layoff. (App. 23a). Finally,

having found no express limitation, he concluded that "the contractual provision which must be applied, since other provisions do not apply, is the management rights clause found in Article 25." (quoted above, App. 23a).

Notwithstanding his earlier conclusions, that the only applicable contract clause was "management rights" and that Employer "required no additional affirmative contractual authority," the Arbitrator reframed the issue and turned to an "implied" limitation on management's rights. (App. 21a). The arbitrator found an "implied" limitation of good faith and fair dealing in the recognition clause (§ 1.01) and the work jurisdiction clause (§ 18.01). (App. 23a). Based upon this implied limitation, he stated that the "ultimate issue boils down to this: did the Company act reasonably when it chose Ms. Wolfe for retention instead of the grievant, Shirley Taylor." (App. 23a).

Despite his prior determinations that the recognition clause, the seniority provision, and the work jurisdiction clause (§ 18.03) were inapplicable where an Employer was selecting between a unit employee and a non-unit employee, the arbitrator, nevertheless, used these same provisions to support his conclusion that the Employer should have retained Taylor (the unit employee) rather than Wolfe (a non-unit employee).

First, he found the recognition clause, Section 18.01, and Section 18.03, "by *implication* state a preference, where a choice must be made for the preservation of work for the bargaining unit." (App. 23a, emphasis added). He found it "reasonable" to recognize Taylor's greater years of service. (App. 24a). He also postulated that as

a result of the layoff, the "remaining employees may be called upon from time to time to perform a wider range of duties than formerly" and, therefore, the Employer should, in his opinion, have kept "Ms. Taylor . . . the most versatile of the two".[2] (App. 24a). Finally, having found that the Employer's argument based upon the overlapping of duties between unit and non-unit employees inapplicable, he then used that fact to support his preference for Ms. Taylor stating that "work falling within the doctrine of overlap is to be shared between the two units, bargaining and non-bargaining, and is not to be given entirely to one." (App. 24a). Having concluded, based upon his perception of the Company's needs, that it was more reasonable for the Company to retain the unit employee rather than a non-unit employee, he sustained the grievance and ordered the grievant reinstated with back pay.

**Motion To Vacate**

The United States District Court for the Eastern District of Tennessee vacated the arbitrator's award holding that the arbitrator "substituted his own judgment for that of the Employer's; and 'dispensed his own brand of industrial justice'" by abandoning the contract and picking the employee the Arbitrator felt would best suit the Employer's future needs. (App. 8a). The United States

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[2]Even if the Employer were selecting for layoff from among two unit employees, seniority (years of service) would not control because the collective bargaining agreement provides that qualifications and fitness to perform the available work are a proper basis for retaining a junior employee over a senior employee and it was undisputed that Ms. Taylor was not qualified to perform all of the tasks required of a clerk-stenographer like Ms. Wolfe. (Article 7, § 7.04, quoted at App. 20a).

Court of Appeals for the Sixth Circuit affirmed the district court in a *per curiam* decision.

The overriding question for this Court is whether this case illustrates a conflict in the circuits requiring Supreme Court resolution (as asserted by the Petitioner) or presents an issue raising novel or unsettled questions of law which would justify granting the petition for writ of certiorari. Respondent submits that it does not.

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## REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

### I. Limitations On A Court's Authority To Review Arbitration Awards Are Well Settled Law

Almost three decades ago, in the *Steelworkers Trilogy*,[3] this Court set forth the basic tenents applicable to judicial review and enforcement of labor arbitration awards. It is now axiomatic that arbitration is the favored means of resolving labor disputes and that an arbitrator's interpretation of a collective bargaining agreement is entitled to great deference. Nevertheless, an arbitrator's authority is not unbridled.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long

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[3]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

*Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

Since 1960, this Court has twice examined the *Trilogy's* standard. In 1983, this Court stated:

> [A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

*W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757, 764 (1983) (internal citations to *Enterprise Wheel & Car* omitted). Last term, this Court gave new emphasis to the *Trilogy* standard in *United Paperworkers v. Misco, Inc.*, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

There can be no dispute that the standard of review in these cases is well-settled. This case, therefore, presents no novel or unsettled questions of law that would justify granting a writ of certiorari.

## II. This Case Raises No Important Question Of Federal Law Warranting Review

The Petitioner argues that a writ of certiorari should issue in this case because (it claims) the Sixth Circuit has

vacated arbitration awards in "sixty percent of its recent published decisions." (Pet. 8). It should first be noted that the Sixth Circuit does not publish every decision. Only those decisions which meet the Sixth Circuit Court of Appeals criteria are published. (Sixth Cir. Ct. R. 24(a)). Because of the deference accorded arbitral awards, a case overturning an arbitration award is more noteworthy than one enforcing an award. This fact alone suggests a simple explanation for the disparity in numbers of published cases vacating an arbitrator's award and the published cases enforcing awards.

Respondent is also mystified by Petitioner's attempt to obtain this Writ of Certiorari based, in part, upon a novel application of the "disparate impact" theory to lower court decisions. In essence, Petitioner is saying that this Sixth Circuit decision is suspect because of an alleged disparity of prior decisions based upon percentages drawn from a limited sampling.[4] Although a novel argument, it is wholly without merit.

Even if a disparity existed in the number of decisions enforcing versus those vacating arbitral awards, it does not suggest that this particular case raises an important question of federal law warranting review. In the present case, the District Court for the Eastern District of Tennessee and the Sixth Circuit Court of Appeals simply ap-

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[4]Twenty-five (25) cases is not a sufficiently large number to make a statistically valid analysis. Further, even accepting Petitioner's allocation of the decisions, and using Petitioner's statements, the percentage is overstated. There are only 13 published decisions vacating an award and ten enforcing the award "since 1979." Respondent did not deem it appropriate to utilize a data base search to identify and cite cases not published under Sixth Circuit Court Rule 24(a).

plied the well-settled principles of the *Trilogy* and *Misco* to the particular facts of this case. In vacating this award, the lower courts did not depart so far from accepted standards to call for this Court's exercise of its power of supervision.

The district court's decision was based upon its articulation of the *Trilogy*. (App. 4a). Both parties called the Circuit's attention to *Misco* before oral argument. The court acknowledged that arbitrator's awards are due great deference and "[a] reviewing court has no authority to weigh the merits of the grievance and to substitute its own judgment for that of the arbitrator's." (App. 4a). However, the court acknowledged that judicial deference is not absolute. Courts have no choice but to refuse to enforce an award where the arbitrator failed to confine himself to the interpretation and application of the collective bargaining agreement. The decision reflects adherence to these principles.

In the present case, the court did not substitute its contractual interpretation for that of the arbitrator. Rather, the arbitrator failed to confine himself to the interpretation and application of the contract and without any authority to do so, substituted his judgment for that of the Company. The collective bargaining agreement (by its terms) is applicable only to unit employees. The parties contractually agreed to submit disputes regarding "the interpretation or violation of express provisions" of the agreement to arbitration. The parties submitted such an issue to the arbitrator asking:

> "Did the Company *violate the agreement* when it removed the grievant Shirley Taylor from her position . . . resulting in her layoff?"

The arbitrator initially answered that question negatively. He concluded that Ms. Taylor was laid-off, that leaving a job classification unfilled did not constitute a violation of the labor agreement and that management had expressly retained the authority to "direct and supervise the Company's plant" and to "layoff for lack of work or other proper reason." (App. 20a-21a). He determined that the only applicable contract provision was the management rights clause. He concluded that management had the authority under that clause to layoff the grievant. Having answered the question submitted for arbitration, the arbitrator's authority ceased.

However, despite express limitations upon the arbitrator's authority, he sought to answer a question which was not submitted for arbitration and involved persons not subject to the collective bargaining agreement. In doing so, the arbitrator was no longer "even arguably construing or applying the contract or acting within the scope of his authority." *Misco,* 109 S.Ct. at 370, 98 L.Ed.2d at 299. Nor was he properly "looking for guidance from other sources." *Enterprise Wheel & Car,* 363 U.S. at 597. The arbitrator's assessment of the relative merits of a non-unit employee and suppositions about the variety or nature of the work the Company expected the remaining non-unit employees to perform were simply not based on, nor drew their essence from, the collective bargaining agreement. The arbitrator was simply "dispensing his own brand of industrial justice" based upon his personal

perceptions. *Id.* Therefore, the award was properly vacated and presents no important question of federal law warranting review.

### III. There Is No Conflict Among The Circuits

There is no "square and irreconcilable" conflict among the circuits requiring Supreme Court resolution, as asserted by Petitioner. Petitioner's argument (incorporated by reference) for the existence of a conflict among the circuits is based solely upon decisions wherein an employer challenged an arbitrator's authority to mitigate the discipline imposed by an employer who had carried its burden of showing that the employee had engaged in misconduct. On this issue, there is no conflict. None of the discharge cases[5] cited by Petitioner as supporting its conclusion that a conflict exists contain statements rejecting or criticizing the Sixth, Tenth or First Circuit decisions with which they allegedly conflict. To the contrary, the cases cited in support of a conflict expressly rely upon Sixth Circuit decisions as precedent.

In *Kane Gas Light & Heating v. Int'l Bhd. of Firemen & Oilers, Local 112,* 687 F.2d 673 (3d Cir. 1982), the Third Circuit acknowledged agreement with one Sixth Circuit decision addressing the authority of an arbitrator to mitigate a discharge, *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980). In *Nestle* the arbitrator found the employee had refused a direct

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[5]The cases referred to are those which the Petitioner incorporated by reference from the arguments made by the United Paperworkers International Union in their petition for a writ of certiorari in *Paperworkers v. S.D. Warren Co.* (88-462).

order on three occasions. Despite the fact that the agreement provided insubordination "shall" constitute cause for discharge, the arbitrator ordered the employee reinstated. The Sixth Circuit found the arbitrator had exceeded his authority by declining to enforce the discharge. In *Kane Gas,* the employer argued, based on *Nestle,* that the arbitrator exceeded his authority by failing to sustain the employer's right to discharge an employee for insubordination. Rejecting the employer's argument because the arbitrator had not found the employee insubordinate, the Third Circuit stated:

> *Nestle,* however, merely stands for the proposition—*with which we fully agree*—that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

*Kane Gas Light & Heating,* 687 F.2d at 680 (emphasis added).

Petitioner has failed to consider Sixth Circuit decisions which reach the same conclusion and are consistent with the Third, Fifth, Seventh and Eighth Circuit decisions holding that an arbitrator's award cannot be vacated simply because management has expressly reserved certain rights which are arguably infringed upon when an arbitrator mitigates a discharge. One such case is *Timken Co. v. Steelworkers,* 492 F.2d 1178 (6th Cir. 1974). In *Timken* the Sixth Circuit enforced an arbitrator's award reinstating an employee who had been discharged for violating a rule prohibiting an employee from striking another employee. The arbitrator found the discharged em-

ployee had "technically" violated this rule. The arbitrator ordered the employee reinstated. The employer, unsuccessfully challenged the reinstatement as a violation of its reserved rights. The Court stated with reference to the management rights clause,

> It cannot follow from such reserved power that a legitimate dispute could not arise with respect to the method or manner in which the company should exercise its managerial functions or *the imposition of penalties in individual cases.*

*Id.*, 492 F.2d at 1179 (emphasis added). Thus, the Sixth Circuit has concurred in the position that an arbitrator's award cannot be vacated simply because management has expressly reserved certain rights which are arguably infringed upon when an arbitrator reinstates a discharged employee.

The Sixth Circuit's decision in *Timken* was expressly relied upon by the courts of appeal in two of the four cases cited by Petitioner as indicative of the conflict in the circuits: *Arco-Polymers, Inc. v. Local 8-74, OCAW*, 671 F.2d 752 (3d Cir. 1982) and *Kewanee Machinery v. Local Union No. 21, Int'l Bhd. of Teamsters*, 593 F.2d 314 (8th Cir. 1979). Contrary to Petitioner's assertion, no conflict has been shown.

Nor can it be argued that *Timken* was an aberration. In 1985, the Sixth Circuit reiterated its adherence to the position taken in *Timken* in the case of *Ford Motor Co. v. Plant Protection Assoc. National*, 770 F.2d 69 (6th Cir. 1985). Likewise, in *Anaconda Co. v. Dist. Lodge No. 27, Int'l Assoc. of Machinists*, 693 F.2d 35, 37-38 (6th Cir. 1982) and *Industrial Mutual Ass'n v. Amalgamated Wor-*

*kers, Local Union No. 383*, 725 F.2d 406 (6th Cir. 1984) the Sixth Circuit rejected arguments that arbitrators exceeded their authority by mitigating a discharge.

Petitioner has also failed to consider decisions of the Third, Fifth, Seventh and Eighth Circuits holding that arbitrators exceed their authority by mitigating a discharge. For example, in *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood*, 715 F.2d 405 (8th Cir. 1983), the Eighth Circuit held that an arbitrator exceeded his authority by reinstating a discharged employee. The court observed that "the arbitrator's opinion reflected the arbitrator's efforts to balance the equities of the situation rather than to interpret and apply the agreement." *Id.*, 715 F.2d at 409. The Court vacated the award stating:

> Nowhere does the agreement give the arbitrator the authority to determine the fairness or equity of the company's discipline. * * * [T]here are no tensions between sections inherent in the agreement and no ambiguities within the sections. The agreement is not susceptible to any construction beyond its plain meaning. * * * While the Company's form of discipline may have been severe, this fact is neither the arbitrator's nor our concern.

*Id.*, 715 F.2d at 409. *See also, HMC Management Corp. v. Carpenters Dist. Council*, 750 F.2d 1302 (5th Cir. 1985); *Young Radiator Co. v. Int'l Union UAW*, 734 F.2d 32 (7th Cir. 1984).

Petitioner further seeks to show that the Sixth Circuit has developed an aberrant standard of review for arbitral awards based upon commentator criticism of a 197 Sixth Circuit decision, *Detroit Coil Co. v. International Assoc. of Machinists & Aerospace Workers Lodge #8*

594 F.2d 575 (6th Cir. 1979). This position is not substantiated. *Detroit Coil* and other Sixth Circuit's decisions are, in fact, often relied upon by other circuit courts, even those courts with which they allegedly conflict.

In *United Elec. Radio & Mach. Workers v. Litton,* 704 F.2d 393 (8th Cir. 1983), the Eighth Circuit (a court whose decisions allegedly conflict with the Sixth Circuit's analysis) relied upon *Detroit Coil,* as well as a Third Circuit decision (another court whose decisions allegedly conflict with the Sixth Circuit's analysis) in vacating a portion of an arbitral award. The dissent, however, relies upon a different Sixth Circuit decision (*General Telephone Co. v. Communications Workers of America,* 648 F.2d 452, 457 (6th Cir. 1981)) to argue that the award should be enforced.

Similarly, Judge Posner, writing for the Seventh Circuit, approved the Sixth Circuit's decision in *Ford Motor Co.* stating:

> Once the dispute is shown to be within the scope of the arbitration clause, the only question for the court is whether the arbitrator was interpreting the collective bargaining agreement; only if he was not interpreting it, but instead was applying his own ideas of what was fair and equitable, *as in Ford Motor Co. v. Plant Protection Ass'n Nat'l,* 770 F.2d 69, 75-76 (6th Cir. 1985), can the court vacate the award.

*Dreis & Krumpt Mfg. v. Int'l Ass'n of Machinists,* 802 F.2d 247, 253 (7th Cir. 1986) (emphasis added).

The Seventh Circuit, in *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers,* 760 F.2d 173 (7th Cir. 1985), cited *Local Union 59, I.B.E.W. v.*

*Green Corp.*, 725 F.2d 264, 268-69 (5th Cir. 1984) and *American Fed. of Television & Radio Artists, Cleveland Local (AFTRA) v. Storer Broadcasting Co.*, 745 F.2d 392, 398-99 (6th Cir. 1984) for the proposition that courts are to accord deference even to an arbitrator's interpretation of the parties' legal rights. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 1800 (7th Cir. 1985) cited with approval, *Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board*, 724 F.2d 1217, 1222-24 (6th Cir. 1982), in support of the position that an "arbitrator may not modify the contract unless authorized to do so." Likewise, the Fifth Circuit has cited *Storer Broadcasting Co. v. AFTRA, Cleveland Local*, 600 F.2d 45, 47 (6th Cir. 1979) for the proposition that an "arbitrator may not disregard or modify plain and unambiguous provisions of the agreement." *Teamsters, Local Union 657 v. Stanley Structures*, 735 F.2d 903, 905 (5th Cir. 1984).

These decisions illustrate that the Sixth Circuit's decisions are a viable source of law, not an aberration. Moreover, none of the cases cited by Petitioner rely upon *Misco*. Respondent submits that even if a conflict had existed, as Petitioner itself admits, "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." (Paperworkers Petition for Writ at 20).

Petitioner has, therefore, simply attempted to create the impression of a conflict by the selected citation of pre-*Misco* cases reaching differing results. The fact that the circuits have reached a different conclusion in a particular

case or type of case is not indicative of a conflict regarding the arbitrator's authority or the appropriate standard of review. Application of *W. R. Grace, Misco* or the *Trilogy* to particular cases necessarily produces different results, both within each circuit and among the circuits. Differing results are caused by differences in the particular collective bargaining agreements and the facts to which they apply.

The most that can be shown is that lower courts had, pre-*Misco*, used slightly different language in their efforts to espouse whether a particular award "draws its essence from the collective bargaining agreement." Nevertheless, all have attempted to apply the *Trilogy's* well-settled standards. The minor differences reflected in these various articulations of what constitutes grounds to vacate an award do not represent a conflict in the circuits requiring Supreme Court resolution. Nor do these differences pose a threat to the integrity of the finality of arbitral awards. As stated by Elkouri & Elkouri in their book, *How Arbitration Works* (4th ed. 1985):

> The Supreme Court's "essence" standard is sufficiently inexact to present close cases and invite honest differences of opinion as to whether the boundary of the merits has been seriously breached. Absent any evidence of calculated intent by the courts to breach the boundaries prescribed in the *Trilogy*, the basic status of arbitration should not be impaired seriously by some unintended or chance breaches. *Id.*, at 32.

There is no evidence of such a calculated intent to breach the boundaries prescribed in the *Trilogy* or subsequent reiterations of the proper standard of review. Further, there is no evidence of a conflict in the circuits.

More importantly, any alleged conflict illustrated by these cases are inapplicable to the present case. The present case does not involve a discharge decision. It is not even a disciplinary case. This case is purely one of "contract interpretation." Petitioner's attempt to "piggy-back" on the simultaneously filed Paperworkers Petition (88-462) is wholly without merit. Even if it were assumed that the above-cited cases are indicative of a conflict among the circuits on this issue, granting a writ of certiorari in the present case would not provide the Court an opportunity to resolve that conflict.

———o———

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Steven E. Kramer
(Counsel of Record)

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## APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

Joseph F. Spaniol, Jr.,
Clerk of the Court

Area Code 202
479-3011

October 6, 1988

Steven E. Kramer, Esquire
Hunter, Smith & Davis
Law Center, 1212 North Eastman Road
P. O. Box 3740
Kingsport, TN 37664

Re: Communications Workers of America, AFL-CIO v. United Inter-Mountain Telephone Company, No. 88-463

Dear Mr. Kramer:

Your request of October 4, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted; your time has been extended to and including November 18, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

kb
cc: Laurence Gold, Esquire